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No. 06-132

In the Supreme Court of the United States

KEVIN AND JULIA ANDERSON, *ET AL.*, PETITIONERS

v.

TOWN OF DURHAM, MAINE, *ET AL.*, RESPONDENTS

On Petition For A Writ Of Certiorari To The Supreme Judicial Court Of Maine

BRIEF FOR THE ALLIANCE FOR SCHOOL CHOICE, THE BLACK EDUCATIONAL ALLIANCE FOR EDUCATIONAL OPTIONS, THE HISPANIC COUNCIL FOR REFORM AND EDUCATIONAL OPTIONS, AND THE MILTON & ROSE D. FRIEDMAN FOUNDATION FOR EDUCATIONAL CHOICE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Free Exercise Clause requires application of strict scrutiny to a state law that facially discriminates between religious and secular educational options that are functionally equivalent for purposes of the state's secular educational objectives.

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INTRODUCTION & INTERESTS OF *AMICI CURIAE*

Amici curiae are the nation's leading advocates for the provision of publicly funded educational choice. They file this brief to emphasize the stakes of this case for millions of families that lack the means to provide their children with meaningful educational opportunities, and especially for minority families in the nation's inner cities. Religious schools are often the only non-public-school option for the nation's neediest children. This Court's review is needed to ensure that the Maine courts' misguided interpretation of the Free Exercise Clause is not permitted to stifle the nation's nascent school choice experiment by excluding the very schools most vital to its success. A more detailed statement of interest for each *amicus* is set forth in the Appendix to this brief.[1]

STATEMENT

Since 1879, the State of Maine has provided funding to cover tuition paid by parents whose children must attend private high schools because there are no public high schools in their communities. During the statute's first 100 years, Maine covered tuition for religious and nonreligious high schools alike. In 1980, however, the State's Attorney General issued an opinion stating that allowing religious high schools to participate in Maine's "tuitioning" program violated the Establishment Clause. Op. Me. Att'y Gen. 80-2 (1980). Armed with this opinion, the Maine Legislature amended the tuition law to exclude religious schools: "[a] private school may be approved for the receipt of public funds for tuition purposes only if it * * * [i]s a non-sectarian school." 20-A M.R.S. § 2951(2).

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. In accordance with Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amici*, has made a monetary contribution to the preparation or submission of this brief.

The sole asserted basis for this exclusion of religious schools from the program—concern that allowing religious schools to receive publicly funded tuition would violate the Establishment Clause—was laid to rest in *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002). Still, Maine continues to exclude such schools from state funding. Petitioners—parents who would receive tuition funds but for the fact that their children attend "sectarian" schools—thus brought this lawsuit, contending that denying them reimbursement for choosing religious schools violates the Free Exercise Clause and the Equal Protection Clause.

The Supreme Judicial Court of Maine sustained the tuitioning program. Citing *Locke* v. *Davey*, 540 U.S. 712 (2004), the court deemed it "unnecessary to apply a strict scrutiny analysis" to the statute. Pet. App. 27. The court acknowledged the ordinary rule that laws which facially discriminate against religious persons are "presumptively unconstitutional." *Id.* at 25. Nonetheless, it "read [*Davey*] broadly" to mean that "mere exclusion of sectarian schools as recipients of public funds does not create a presumption of animosity." *Id.* at 21, 26. In the court's view, Maine's "concern to avoid excessive entanglements provides a rational basis to maintain the funding limitation in section 2951(2)." *Id.* at 31. The court rejected petitioners' equal protection challenge for similar reasons. *Ibid.*

SUMMARY OF ARGUMENT

I. The decision below represents a grave threat to the viability of the nation's fledgling school choice experiment. Religiously affiliated schools represent some 77 percent of private schools nationwide, and they are indispensable to genuinely competitive school choice in virtually every community. Even more importantly, religious schools are frequently the only private schools that serve the neediest children in our nation's inner cities. Thus, in limiting the availability of meaningful school choice to those who can afford it without state assistance, the decision below is certain to impose a disproportionately harmful effect on

disadvantaged children, especially racial minorities. This Court's intervention is needed now, to ensure that the prospect of meaningful school choice is not thwarted before it has a chance to succeed.

II. The decision below would be tolerable—though no less unfortunate—if it rested on a proper interpretation of the Free Exercise Clause. But the lower court's doctrinal analysis warrants this Court's review in its own right. Citing *Locke* v. *Davey*, 540 U.S. 712 (2004), the court below ruled that the Free Exercise Clause did not prohibit Maine's policy of discriminating against families who choose an education that—but for its religious affiliation—satisfies every curricular requirement of the State. The court refused to apply the usual rule that facial religious discrimination by a State is unconstitutional unless necessary to serve a compelling interest. Instead, the court reasoned that, under *Davey*, facial discrimination against religious schools is subject to rational basis review unless it is motivated by animus. Pet. App. 25.

The Maine Supreme Judicial Court's interpretation of *Davey* is both incorrect and dangerous. *Davey* sustained Washington's exclusion of "religious education for the ministry" from its scholarship programs solely on the basis that "training for religious professions and training for secular professions are not fungible." 540 U.S. at 721. Because the "denial of funding" was limited to "vocational religious instruction alone," the ordinary "presumption of unconstitutionality" did not apply. *Id.* at 725.

The Court in *Davey* did not begin to suggest, however, that States may discriminate against religious education that *is* similar to that offered in private secular schools. Yet Maine discriminates against religious schools that teach all of the same state-mandated subjects that are taught in secular schools. If allowed to stand, therefore, the decision below will encourage Maine—and the 30-plus States whose Blaine Amendments purport to bar public funding of education provided by religious schools—to con-

tinue discriminating against religious schools without any compelling reason for doing so. This Court should intervene now to prevent that result.

ARGUMENT

Under cover of a discredited view of the Establishment Clause, Maine excludes a class of citizens from a public educational benefit solely because of their religious beliefs. Whether this policy is valid under the Free Exercise Clause is an issue of vital importance to the nation's school choice experiment. In Part I, we demonstrate that the nation's school choice programs are working and on the rise, but that the participation of religious schools—which the decision below threatens—is critical to their success. In Part II, we show that the decision below rests on a misinterpretation of this Court's free exercise decisions—and in particular *Davey*—and that discrimination of the sort that Maine engages in should be subject to strict scrutiny, which it does not satisfy. For all these reasons, the Court should grant review.[2]

I. The Success Of The Nation's Fledgling School Choice Experiment Depends In Substantial Part Upon The Participation Of Religious Schools.

Today, no less than in 1954, "education is perhaps the most important function of state and local governments." *Brown* v. *Board of Educ.*, 347 U.S. 483, 493 (1954). Now, as then, education "is required in the performance of our most basic public responsibilities," and it is "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Ibid.* Indeed, "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Ibid.* In sum, "[t]he grave significance of

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[2] The *amici* support the petition for certiorari on both questions presented, but here address only the second question. See Pet. i.

education both to the individual and to our society cannot be doubted." *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 30 (1973) (quotations omitted); see also *Plyler* v. *Doe*, 457 U.S. 202, 221 (1982) (education is vital to "sustaining our political and cultural heritage").

A. Education Policymakers Face Extraordinary Challenges In Addressing The Plight Of The Nation's Embattled Public Schools.

As this Court is aware, policymakers at all levels of government take this "most important function" seriously, but they face extraordinary challenges. In *Zelman*, the Court sustained a school choice program in Cleveland, Ohio, where the schools were so troubled as to necessitate federal court oversight. 536 U.S. at 644. The education crisis is by no means limited to Cleveland, however, and it is felt most painfully in the nation's inner cities. In the District of Columbia, for example, some 80 percent of public high school students failed standardized tests in basic math skills, and 57 percent failed in reading. And all this despite the fact that per-pupil spending there is the highest in the nation.[3]

The poor condition of inner-city school systems imposes disproportionate harms on racial minorities. On virtually every measure of the National Assessment of Educational Progress, black and Hispanic scores lag behind their white counterparts. In addition, for the class of 2001, only 56 percent of black students and 52 percent of Hispanic stu-

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[3] Susan L. Aud & Leon Michos, *Spreading Freedom and Saving Money: The Fiscal Impact of the D.C. Voucher Program* 3-4 (2006), http://www.cato.org/pubs/wtpapers/dcvouchersrm3cvr.pdf; Jay P. Greene & Marcus A. Winters, *An Evaluation of the Effect of D.C.'s Voucher Program on Public School Achievement and Racial Integration After One Year* 1 (2006), http://www.manhattan-institute.org.pdf/ewp_10.pdf (in 2001-02, "Washington, D.C. public schools spent $15,489 per pupil—substantially more than any other state," but "the District consistently ranks among the bottom of the nation in educational outcomes").

dents graduated from high school with a regular diploma, compared with 78 percent of white students. Thus, roughly half of black and Hispanic students obtain the educational level needed to attend college.[4]

There is a strong correlation, moreover, between high school dropout rates and job prospects—and, consequently, dependence on public assistance. In 2000, 65 percent of black male high school dropouts in their twenties were unemployed. By 2004, the share had grown to 72 percent, compared with 34 percent of white and 19 percent of Hispanic dropouts. Even when high school graduates are included, half of black men in their twenties were jobless in 2004, up from 46 percent in 2000.[5] And when they do find jobs, black men remain twice as likely as whites (and Hispanic men three times as likely) to be employed in jobs requiring no skills. Compared to white women, black and Hispanic women are likewise employed in relatively fewer jobs that require skills, credentials, and a diploma.[6]

In addition, this disparity in educational opportunities may also have an impact on crime rates. Incarceration rates for blacks are twice as high as those for Hispanics and five times higher than the rates for whites.[7] Yet just one additional year of schooling results in a 0.1 percent reduction in the probability of incarceration for whites and a 0.37 percent reduction for blacks. Based on these statistics, even a one percent increase in male high school

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[4] Jay P. Greene, *High School Graduation Rates in the United States* 3 (Black Alliance for Educational Options rev. 2002), http://www.manhattan-institute.org/pdf/cr_baeo.pdf.

[5] Peter Edelman, Harry J. Holzer, & Paul Offner, *Reconnecting Disadvantaged Young Men* (Urban Institute Press 2006).

[6] Harry J. Holzer, *What Employers Want: Job Prospects for Less-Educated Workers* (Russell Sage Foundation 1999).

[7] U.S. Dep't of Justice, Bureau of Justice Statistics, *Criminal Offender Statistics*, http://www.ojp.usdoj.gov/bjs/crimoff.htm#prevalence (visited Aug. 25, 2006).

graduation rates could make a significant difference in incarceration rates, saving as much as $1.4 billion in prison costs, or about $2,100 per graduate.[8] Needless to say, the job prospects for those who lack skills and credentials, are dependent on welfare, and have criminal records—all disproportionately minorities—are grim.

Facing these systemic problems in public education—and their downstream effects—policymakers increasingly have begun to experiment with various education reforms, including several variations of school choice. Programs in Cleveland, the District of Columbia, and Milwaukee are perhaps best known, but school choice experiments may be found today in several States and many cities nationwide. Policymakers across the country have determined that school choice programs of varying descriptions promise improvements in public and private schools alike, for the benefit of students and parents in every community.

B. Early Indicators Confirm That School Choice Holds Promise For Improving Both Academic Performance And Racial Inequities In Public And Private Education.

Although these school choice experiments are still in the developmental stages, early indicators are promising. According to available data, school choice programs have resulted in improved reading and math scores, fewer disciplinary problems (*e.g.*, cheating and fighting), greater confidence among students, and, not surprisingly, greater parental satisfaction with their children's education.[9]

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[8] Lance Lochner & Enrico Moretti, *The Effect of Education on Crime: Evidence From Prison Inmates, Arrests, and Self-Reports*, 94 American Econ. Rev. 155 (2004).

[9] William G. Howell & Paul E. Peterson, *The Education Gap: Vouchers and Urban Schools* (Brookings Institution Press 2002); Patrick J. Wolf, Paul E. Peterson, & Martin R. West, *Results of a School Voucher Experiment: The Case of Washington, D.C. After Two Years* (2001), http://www.innovations.harvard.edu/cache/

Moreover, the data demonstrate that school choice programs have positive effects on both racial and economic integration efforts.[10] For example, a recent analysis of school choice in the District of Columbia concluded that "[o]f those students who used a voucher to attend a private school, 94% are African American. When we consider that the vast majority of students using the vouchers are non-white and that private schools are more racially integrated than the public schools that those children are leaving by having lower concentrations of African-American students, it is clear that the program is likely reducing racial segregation in schooling."[11] As another study concluded: "choice can allow parents not only to move their children from schools that perform poorly, but also from schools that have become racially segregated due to location or economics."[12]

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documents/4991.pdf; Paul E. Peterson & David E. Campbell, *An Evaluation of the Children's Scholarship Fund* (2001), http://www.innovations.harvard.edu/cache/documents/4863.pdf; Jay P. Greene, *A Survey of Results From Voucher Experiments: Where We Are and What We Know* (2000), http://www.manhattan-institute.org/html/cr_11. htm.

[10] Howard L. Fuller & Deborah Greiveldinger, *The Impact of School Choice on Racial Integration in Milwaukee Private Schools* (American Educ. Reform Council 2002), http://www.schoolchoiceinfo.org/data/research/integ0802.pdf; Jay P. Greene, *The Racial, Economic, and Religious Context of Parental Choice in Cleveland* (1999), http://www.schoolchoiceinfo.org/data/research/Clevint.pdf.

[11] Jay P. Greene & Marcus A. Winters, *An Evaluation of the Effect of D.C.'s Voucher Program on Public School Achievement and Racial Integration After One Year* 1 (2006), http://www.manhattan-institute.org/pdf/ewp_10.pdf.

[12] Christopher W. Hammons, *The Effects of Town Tuitioning in Vermont and Maine* 21 (Milton & Rose D. Friedman Foundation 2001), http://www.friedmanfoundation.org/resources/mainevermontstudy.pdf.

The benefits of school choice, however, are not limited to *private* schools. For example, the public schools in San Antonio, Texas, which must compete with private schools in a school choice program, outperformed 85 percent of Texas school districts, after controlling for population demographics and local resources.[13] Similarly, a study of school choice in Vermont and Maine—including the program at issue here—found that "as competition increases, standardized test scores also increase. This is true even when controlling for other factors such as per-pupil spending, poverty, and urbanization."[14]

As these preliminary reports indicate, school choice programs represent a promising approach to education reform, and one that is especially attractive to policymakers in disadvantaged communities. These programs already have produced benefits suggesting real hope for the neediest students.

C. Religious Schools Are Indispensable To Meaningful School Choice, Especially At The Outset Of Programs And In The Nation's Inner Cities.

Religious schools play a vital role in the success of any school choice program. Because these schools make up the great majority of all private schools, the success of any school choice program necessarily depends upon religious schools' participation. According to the U.S. Department of Education, more than 77 percent of private schools have a religious affiliation.[15] Whereas 8.4 percent of students

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[13] Jay P. Greene & Greg Forster, *Rising to the Challenge: The Effect of School Choice on Public Schools in Milwaukee and San Antonio* 8 (Manhattan Institute 2002), http://www.manhattan-institute.org/html/cb_27.htm.

[14] Hammons, *supra*, at 18.

[15] U.S. Dep't of Education, National Center for Education Statistics, *Private School Universe Survey*, http://nces.ed.gov/ surveys/pss (visited Aug. 25, 2006).

attend church-related private schools, only 2.4 percent attend secular private schools.[16]

An examination of three cities with prominent school choice programs—Cleveland, Milwaukee, and the District of Columbia—confirms the singular importance of religious schools to the effectiveness of school choice. In Cleveland's program, for example, roughly 82 percent of the private schools participating in the program were religiously affiliated, and some 96 percent of the students receiving vouchers used them to attend such schools. See *Zelman*, 536 U.S. at 647. In Milwaukee, available data for 1995 show that 75 percent of private schools had a religious affiliation, and that 76 percent of students participating in the city's school choice program attended religious schools.[17] And in the District of Columbia, of the 63 participating schools in 2004-05 for which religious affiliation could be determined, 66 percent were religiously affiliated.[18] A school choice program that excludes such a high percentage of the market participants is handicapping itself, and badly.

But it is not merely their numbers that make religious schools so important to the success of school choice. The experience of pioneering school choice programs teaches that—especially in the inner cities—religious schools will be most ready to fill the demands of parents, particularly at the outset of the programs. "[A] voucher system that includes religious schools could immediately offer many children a range of new opportunities, but [one] legally

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[16] U.S. Dep't of Education, National Center for Education Statistics, http://nces.ed.gov/fastfacts/display.asp?id=6 (visited Aug. 25, 2006).

[17] 8 *Wisconsin Policy Research Institute Report* 6 (1995); Fuller & Greiveldinger, *supra*, at 6.

[18] U.S. Dep't of Education, *Evaluation of the D.C. Opportunity Scholarship Program*, http://www.ed.gov/rschstat/eval/choice/dcchoiceyeartwo.pdf.

restricted to nonsectarian schools could not, for supply would be quite limited and there would be *nowhere for most kids to go.*"[19] Indeed, as Yale Law Professor Stephen Carter has noted: "a voucher program that omits religious education would leave out most of the parents who most need it." Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* 194 (1993).

In Milwaukee, for example, where the nation's first parental choice program was created in 1990, the initial exclusion of religious schools led to a shortage of available private schools. Recognizing the importance of religious schools to the education reform effort, the State expanded the program in 1995 to include religious schools. Only then did the program begin to thrive.[20]

Moreover, religious schools are effective in advancing the educational and social policy objectives of the school choice programs in which they participate. For example, social scientists have noted that Catholic schools promote greater educational attainment for minority children, regardless of background, because they provide a common academic curriculum and high academic expectations.[21] As one scholar has observed, Catholic schools strongly improve educational outcomes for urban minority children,

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[19] John E. Chubb & Terry M. Moe, *Politics, Markets & America's Schools* (1990) (emphasis added).

[20] Daniel McGroarty, *Break These Chains: The Battle for School Choice* (1996); Mikel Holt, *Not Yet "Free at Last": The Unfinished Business of the Civil Rights Movement—Our Battle for School Choice* (ICS Press 2000).

[21] *E.g.*, James S. Coleman, Sally B. Kilgore, & Thomas Hoffer, *High School Achievement: Public, Catholic, and Private Schools Compared* (1982); Derek Neal, *The Effects of Catholic Secondary Schooling on Educational Achievement*, 15 J. Lab. Econ. 98 (1997); Paul T. Hill, Gail E. Foster, & Tamar Gendler, *High Schools With Character* (Rand 1990).

with the odds of graduation for urban black and Hispanic children increasing 26 percent and the likelihood of college attendance increasing threefold.[22] Urban minorities receive significant benefits from Catholic schooling "because their public school alternatives are substantially worse than those of whites and other minorities who live in rural or suburban areas."[23]

In sum, the empirical data leave no doubt that school choice experiments hold promise for great improvement in public and private education in the most disadvantaged communities, and no doubt that religious schools are vital to achieving such results. Indeed, given the demonstrated importance of religious schools in forming the critical mass of private schools necessary to make a school choice program function at all, it is not an overstatement to say that a school choice program that excludes religious schools is likely doomed from the start.

II. The Maine Court's Reading of *Davey* Rests Upon A Misunderstanding Of The Free Exercise Clause That Unjustifiably Threatens To Undermine The Nation's School Choice Experiment.

As long as it acts in conformity with the Constitution, a State is of course free to pursue unwise or wrong-headed educational policies. As shown below, however, the Maine Supreme Judicial Court has not only approved a policy that threatens to undermine the basic efficacy of school choice by foreclosing the option of religious schools and thus limiting the number of private schools that can participate. It has done so based upon an interpretation of the First Amendment that is wholly unfounded.

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[22] Neal, *supra*, at 98-100.

[23] *Ibid.*

A. *Davey* Did Not Disturb The General Rule That Facial Religious Discrimination By The State Is Presumptively Unconstitutional.

Few principles are more firmly settled in this Court's jurisprudence than that the government may not "impose special disabilities on the basis of religious views or religious status." *Employment Div.* v. *Smith*, 494 U.S. 872, 877 (1990); see also *McDaniel* v. *Paty*, 435 U.S. 618, 628 (1978). Although the Court in *Smith* held that neutral, generally applicable laws are not typically subject to strict scrutiny, both the majority and dissenting Justices in *Smith* agreed that the state's *facial* religious discrimination is presumptively unconstitutional. 494 U.S. at 877; *id.* at 894 (O'Connor, J., concurring in judgment); *id.* at 909 (Blackmun, J., dissenting). As the Court unanimously held in *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 533 (1993), the "minimum requirement of neutrality is that a law not discriminate on its face." Thus, laws that facially discriminate against religion "must undergo the most rigorous of scrutiny": they "must advance interests of the highest order, and must be narrowly tailored in pursuit of those interests." *Id.* at 546 (quotations omitted).

Davey did not alter this fundamental doctrine. To the contrary, the Court there expressly reaffirmed the rule set forth in *Lukumi*. See 540 U.S. at 720-721. As the Court went on to explain, however, the ordinary "presumption of unconstitutionality" did not apply because the government was not in fact discriminating between similarly situated religious and nonreligious individuals. *Id.* at 721-725. As the Court put it: "training for religious professions and training for secular professions *are not fungible*. Training someone to lead a congregation *is an essentially religious endeavor*. Indeed, majoring in devotional theology *is akin to a religious calling*." *Id.* at 721 (emphasis added).

The Court thus reasoned that comparing educational training for the ministry to educational training for secu-

lar professions is not comparing apples to apples. And because "[t]he State ha[d] merely chosen not to fund a *distinct category* of instruction," the Court held that "deal[ing] differently with religious education for the ministry than with education for other callings" was "not evidence of hostility toward religion." *Id.* at 712, 721 (emphasis added). Rather, the fact that the program "exclud[ed] *only* the ministry from receiving state dollars reinforced [the Court's] conclusion that religious instruction [was] *of a different ilk*." *Id.* at 723 (second emphasis added).

This reading of *Davey* is confirmed by an examination of the nature of the program at issue there. Washington's Promise Scholarship program "permit[ted] students to attend pervasively religious schools, so long as they [were] accredited." *Id.* at 724. The program also "includ[ed] religion" by allowing students to study religion in non-theology-major coursework, or to take courses that offered a religious perspective on secular subjects. *Id.* at 724-725. Because the program did not discriminate between similarly situated individuals, the Court rejected the argument that "the denial of funding for vocational religious instruction alone is inherently constitutionally suspect." *Id.* at 725. And "[w]ithout a presumption of unconstitutionality, Davey's claim [had to] fail." *Ibid.*

In sum, *Davey* does not authorize the government to engage in religious discrimination in education unless the coursework for which funding is being denied amounts to "*an essentially religious endeavor*" or a "*religious calling*." 540 U.S. at 721 (emphasis added). Nor does it authorize discrimination against those who attend "pervasively religious schools, so long as they are accredited" and the student attending them is not seeking "religious education *for the ministry*." *Id.* at 721, 724 (emphasis added). Where a State denies funding to those attending religious schools whose curriculum fully serves the State's secular educational ends, the "presumption of unconstitutionality" (*id.* at 725) remains fully applicable.

B. *Davey* Rests On The Notion That Ministerial And Secular Education Are Not Fungible, And Does Not Support Discrimination Between Religious And Secular Schools That Equally Serve The State's Secular Objectives.

Citing "the benefit of the analysis in [*Davey*]," the court below nevertheless held that it was "unnecessary to apply a strict scrutiny analysis" to Maine's policy of denying tuition only to parents who enroll their children in religious schools. Pet. App. 27. According to the court, "the mere exclusion of sectarian schools as recipients of public funds does not create a presumption of animosity." *Ibid.* The court acknowledged that such an approach "read [*Davey*] broadly," but found this reading of *Davey* justified by the "play in the joints" between the Establishment and Free Exercise Clauses. *Id.* at 19, 21. This analysis is flawed at many levels.

1. To begin with, facial discrimination against religion is subject to strict scrutiny even if such discrimination is *not* motivated by animosity toward religion. In *Lukumi*, for example, only two Justices (Kennedy and Stevens, JJ.) even found it relevant that the ordinance at issue was motivated by animus. See 508 U.S. at 540-542 (plurality opinion). The Court's majority found that strict scrutiny was warranted solely because the statute, on its face, treated religious reasons for killing animals less favorably than secular reasons for doing so. *Id.* at 533. The same reasoning warrants the application of strict scrutiny here.

2. More fundamentally, however, the court below failed to consider the *reason* that this Court did not apply strict scrutiny in *Davey*: the fact that training for ministry and training for secular professions were not "fungible." 540 U.S. at 721. For a number of reasons, that rationale does not apply to Maine's tuition program.

First, the religious schools to which petitioners send their children do not offer "devotional degrees," "religious training of clergy," or "education for the ministry." *Id.* at

721, 722 n.5, 725. Thus, attending these schools is not "an essentially religious endeavor," as was the education of Joshua Davey. *Id.* at 721. Moreover, nothing in Maine law constitutes a specific, narrowly tailored provision that could conceivably be justified as a longstanding state ban on public funding for the training of clergy.

Second, several features of Maine's tuition law make clear that, in contrast to schools that train students for the ministry, the religious high schools excluded from Maine's tuition program fully satisfy the State's secular objective of preparing students to enter secular careers.

For example, as a condition for designation as an "approved" school for state attendance purposes, Maine requires (among other things) that all schools either receive accreditation from the New England Association of Colleges and Secondary Schools or comply with mandates including basic instruction in designated curriculum, certification of teachers, length of school day, and student-teacher ratios. Pet. App. 4. Schools that choose the latter route to approved status must use the English language for general-instruction, provide special education classes and courses in American and Maine history, including Native American history. 20-A M.R.S. §§ 4701, 4702, 4706.

Moreover, for secondary schools, Maine law provides that "[t]he course of study must include instruction of all students in English language arts, mathematics, science and technology, social studies, health and physical education, career preparation, visual and performing arts and foreign languages. *Id.* § 4721. And to confer diplomas, such schools must offer (and students must complete) four years of English, two years of social studies and history, two years of mathematics, two years of science, and one year of fine arts; instruction in health, safety, and physical education and computers. *Id.* §§ 4722-4724. In addition, private schools that enroll at least 60 percent of publicly funded students are subject to the "statewide system of learning results"—"high academic standards at all grade

levels in the areas of math; English; science and technology; social studies, including history, economics and civics; career preparation; visual and performing arts; health and physical education; and foreign languages." *Id.* § 6209.

The curricular offerings of the religious schools that seek to participate in Maine's tuition program are no less able than secular schools' offerings to satisfy these secular educational objectives. Religious schools that satisfy each and every criterion, however, are categorically excluded from participating. *Id.* § 2951(2). This stands in sharp contrast to *Davey*, where the issue was whether a State could exclude one distinct category of instruction, *not* whether religious schools could be excluded wholesale. Indeed, *Davey* expressly relied upon the State's inclusion of accredited "pervasively religious schools" to explain why Washington's program did not exhibit hostility to religion. 540 U.S. at 721-724; see generally Michael W. McConnell, *The Selective Funding Problem: Abortion and Religious Schools*, 104 Harv. L. Rev. 989, 1020 (1991) ("parochial schools, provided they meet the same objective standards of educational quality met by the public schools, produce the same benefit to the public, and they cost no more").

3. The fact that Maine law facially discriminates against similarly situated religious schools is further confirmed by 20-A M.R.S. § 2903, "Governing body requirements." That section provides that "[n]othing in this subchapter shall restrict the authority of the governing body of a private school to require additional subjects to be taught in their school." Thus, parents are entitled to reimbursement from the State for tuition at private high schools that offer courses in Marxism—an *atheistic* philosophy—regardless of whether such courses further the State's educational objectives. But a parent may not receive reimbursement for tuition at religious schools—even if the schools satisfy every state curricular mandate—solely because they also offer coursework in religious subjects (or courses that offer a religious perspective on secular subjects).

In *Davey*, this Court went out of its way to make clear that "[n]othing in our opinion suggests that the State may justify any interest that its 'philosophical preference' commands." 540 U.S. at 722 n.5. But 20-A M.R.S. § 2903 expressly favors private schools that incorporate a secular philosophy into their teaching over functionally similar private schools that incorporate a religious philosophy into their teaching. In other words, Maine's treatment of the non-state-mandated elements of private schools' curricula provides powerful evidence that Maine disfavors schools that, but for religious affiliation, are similarly situated to eligible secular schools. *Davey* provides no support for such facial religious discrimination.

4. One final statutory provision highlights the discriminatory quality of Maine's tuition program. Section 1221, entitled "Teaching of virtue and morality," mandates that "[i]nstructors of youth in public or private institutions shall use their best endeavors to impress on the minds of the children and youth committed to their care and instruction" the following principles:

> *the principles of morality and justice and a sacred regard for truth*; love of country, *humanity and a universal benevolence*; *the great principles of humanity* as illustrated by kindness to birds and animals and *regard for all factors which contribute to the well-being of man*; industry and frugality; chastity, moderation and temperance; and *all other virtues which ornament human society*.

20 M.R.S. § 1221 (emphasis added). The statute further requires all public and private school teachers "to lead those under their care, as their ages and capacities admit, *into a particular understanding of the tendency of such virtues to preserve and perfect a republican constitution, secure the blessings of liberty and to promote their future happiness*." *Ibid.* (emphasis added).

State law thus requires both public *and* private schools to provide morals education. And each and every school

that does so is entitled to state support—unless, of course, the school's understanding of such virtues is grounded in a religious perspective. It is difficult to imagine a clearer case of discrimination against parents who choose to send their children to religious schools.

In sum, the broader framework of the State's education statutes confirms that Maine's refusal to reimburse tuition expenses of parents who send their children to religious schools is subject to a presumption of unconstitutionality. In contrast to training for the ministry, at issue in *Davey*, the curricular offerings of private religious schools in Maine fully meet the State's secular educational objective of "career preparation." 20-A M.R.S. § 4721. Moreover, the State bends over backwards to preserve the integrity of non-state-mandated coursework offered by approved private schools—except in the case of private *religious* schools. This Court's review is therefore warranted to ensure that when the government discriminates between functionally equivalent religious and secular educational offerings, it has a compelling reason for doing so. Maine has offered no such justification.[24]

5. A decision in this case would also have a direct effect on school choice experiments in the more than 30

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[24] Perhaps aware that its reading of *Davey* was overly broad, the court below sought to buttress its holding by reasoning that § 2591(2)'s exclusion of religious schools does not "substantially burden" religion because "[n]one of the parties asserts that their religious beliefs *mandate* that they send their children to religious schools." Pet. App. 9, 27 (emphasis added). But the "substantial burden" analysis is relevant only to whether a *neutral* law burdens religion. Where a law *facially* discriminates against religion, the Court does not consider whether the burden involved is substantial because the discrimination itself is the injury. *E.g.*, *Smith*, 494 U.S. at 877. Were the rule otherwise, the state could justify religious discrimination on the ground that the benefits involved were not substantial. That has never been the law.

States whose constitutions contain "Blaine Amendments." See *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality opinion). Those provisions, like the Maine law at issue here, facially discriminate on the basis of religion and thus are presumptively invalid. Moreover, those provisions are frequently construed to discriminate against children who pursue religious schooling even in cases involving indirect aid. *E.g.*, *Bush* v. *Holmes*, 886 So. 2d 340, 363-365 (Fla. Dist. Ct. App. 2004) (invalidating a school choice program, over free exercise objections, under a Blaine Amendment), *aff'd on other grounds*, 919 So. 2d 392 (Fla. 2006). Thus, those provisions likewise threaten to stifle the school choice experiment before it has a fair chance to succeed.

* * * * *

School choice is a promising experiment, and religious schools are a critical component of that experiment. Based upon a misinterpretation of *Davey*, however, the court below has created significant uncertainty as to whether restrictions such as those found in Maine law, and in States with Blaine Amendments, are constitutional. This Court should grant the petition and settle once and for all the question whether States may discriminate against parents who choose an educational option that fully satisfies every secular state objective, solely because the education is offered by a religious school.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

INTERESTS OF *AMICI CURIAE*

The Alliance for School Choice (the Alliance) is a nonprofit organization whose mission is to improve our nation's K-12 system of education by advancing systemic and sustainable public policies that empower parents, particularly in low-income families, to choose the education they determine is best for their children. The Alliance and its sister organization, Advocates for School Choice, are leading national advocates for public funded school choice programs that are targeted toward disadvantaged schoolchildren. As a result, the Alliance is deeply and directly concerned with legal obstacles that prevent the fulfillment of our nation's sacred promise of equal educational opportunities for all children.

The Black Alliance for Educational Options (BAEO) is a non-profit, intergenerational organization of educators, parents, students, community activists, public officials, religious leaders, and businesspeople. BAEO's mission is actively to support parental choice to empower families and increase their educational options. Low-income parents—principally blacks and Hispanics—have less access than middle- and upper-income parents to high-quality schools. This lack of access contributes to the widening gap between minorities and whites on virtually every indicator of academic achievement. BAEO believes that the American ideal of equal opportunity is unattainable for disadvantaged black children without meaningful choice among educational opportunities.

The Hispanic Council for Reform and Educational Options (CREO) is a non-profit, non-partisan organization that was formed in response to the educational crisis of Latino children, who are officially the most uneducated and under-educated minority group in the nation. CREO's mission is to improve educational outcomes for Hispanic children by empowering families through parental choice in education.

The Milton and Rose D. Friedman Foundation for Educational Choice (the Foundation) was founded upon the ideals and theories of Nobel Laureate economist Milton Friedman and economist Rose D. Friedman. The Foundation strives to educate parents, policymakers, and other organizations about the desperate need for a shift of power to the disenfranchised parents of America who have limited choices in the education of their children.